

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 June 2005

BALCA Case No.: 2004-INA-00267
ETA Case No.: P2003-PA-03393522

In the Matter of:

TOWN AND COUNTRY LAWN CARE, INC.,
Employer

on behalf of

MIGUEL QUINTANA RIVERA,
Alien.

Appearance: Daniel G. Anna, Esquire
Media, Pennsylvania
For the Employer and the Alien

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Town and Country Law Care, Inc. ("Employer") filed an application for labor certification¹ on behalf of Miguel Quintana Rivera ("Alien") on February 19, 2002 (AF 42).² The Employer seeks to employ the Alien as a Landscaping Foreman (Occ. Code: 408.161-010). *Id.* This decision is based on the record upon which the

¹ Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656.

² In this decision, AF is an abbreviation for Appeal File.

Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

BACKGROUND

In its application, the Employer described the duties of the position as “designs, plans and supervises landscaping installation and maintenance projects. Including designing landscaping plans and structures, coordinating logistics, supervising landscaping crew, training crew members in various landscaping techniques, and ensuring completion of project according to customer needs. Includes installation of retaining walls, walkways, sprinkler systems, and various trees and plants using various hand tools, backhoe, front loader, and other general landscaping equipment.” The Employer required two years of experience in the job offered or two years experience in landscaping, construction or other horticultural work (AF 42). According to a case summary, the Employer requested reduction in recruitment (AF 41).

In the Notice of Findings (NOF), issued December 23, 2003, the CO found that there is a question as to whether the job opportunity is for permanent full-time work. The CO stated that there was insufficient information to determine whether the Alien will perform the duties of a landscape gardener on a full-time year round basis. The CO noted that the work of a landscape gardener is generally performed at certain seasons of the year or periods of the year. Absent additional information, the job could not be considered permanent employment because the work is not generally performed during the winter months. The CO directed the Employer to submit copies of payroll records for the last three years which show each employee by name, the number of hours worked, and the gross wages. The CO further directed that the documentation must show that the job duties are performed on a continuing basis and that occupants of the job are not financially dependent on obtaining other employment or unemployment compensation during intermittent breaks in the year (AF 39-40).

The Employer submitted rebuttal on January 28, 2004. In its rebuttal, the Employer stated that payroll records for individuals who have held the job in the past

three years are not available since the owner of the business had performed the job duties of Landscaping Foreman and supervised the work crews of the Employer. The Employer submitted copies of monthly checks which were issued to the owner. The Employer stated that these monthly checks were the owner's corporate dividend and demonstrated year round payment for the owner's work as foreman/owner. The Employer also submitted copies of contracts to demonstrate work performed by the foreman/owner during the winter months. The owner stated that he needs to hire someone to do the work he has performed because his business is growing and he can no longer do all the work required. In addition, the owner stated that he is aging and has had hip surgery recently and therefore needs to hire a qualified employee to make his business flourish (AF 16-36).

On February 18, 2004, the CO returned the rebuttal since it was not filed timely by January 27, 2004 (AF 13-14). By letter dated March 18, 2004, the Employer requested reconsideration arguing that the Federal Express tracking system showed the rebuttal was logged only one day late. The Employer stated that perhaps the box was emptied early on January 27, 2004 or perhaps the package was overlooked in the collection box until January 28, 2004. However, the Employer requested the rebuttal be accepted since the time periods are not jurisdictional and the CO has the discretion to waive the time period where manifest injustice would result (AF 10-13).

The CO apparently accepted Employer's request for reconsideration since a Final Determination was issued on March 31, 2004. The Final Determination denied Employer's application for labor certification (AF 7-8). In so doing, the CO stated that 20 C.F.R. § 656.3 (Subpart A) defines employment as permanent full-time work by an employee for an employer other than oneself. The CO noted that the NOF stated that there was insufficient information to determine whether the Alien would perform the duties on a full-time basis year round. The eleven monthly checks made out to the owner with dates of March 2, 2003 through December 1, 2003 could not be accepted as evidence of full-time year round employment. The CO stated that checks that the owner draws on the business do not document full-time year round employment since they are a

corporate dividend and do not show hours worked or earnings per hour. The CO also noted payroll records could have been submitted which demonstrated the Landscaping Foreman position was required year-round to supervise employees who were employed year round, but no such records were submitted on rebuttal. In addition, the CO noted that the contracts submitted indicated that the work performed by the company is seasonal since the contracts required payments from March through October. The CO found that the contracts supported the CO's finding that the business is seasonal in nature. Finally, the CO noted that the duties listed in the contracts included functions such as cutting grass, fertilization, weeding, spring and fall clean-up. The CO concluded that these duties also establish that the job opportunity is seasonal. The CO held that the Employer did not provide documentation on rebuttal to establish that the job opportunity involves full-time year round employment, and therefore labor certification was denied.

On April 26, 2004, the Employer requested reconsideration, or in the alternative, review (AF 2). In its request for review, the Employer argued that the position in this application is full-time year round work. The Employer argued that the position requires duties to be performed during the winter months -- specifically job bidding and contract negotiations -- and thus, this job opportunity is different from the case of *Vito Volpe Landscaping*, 1991-INA-300 (Sept. 1999)(*en banc*). The Employer also argued that the position is a new position and thus no payroll history could be submitted. The Employer argued that the Employer's definition of the new position must be accepted citing *Marrero*, 1986-INA-470 (1986). The case was docketed by the Board on June 24, 2004. The Employer submitted a brief on July 15, 2004 which argued that the CO erred in finding the job seasonal in nature and not full-time year round employment. In addition, the Employer argued that the CO erred by refusing to consider all relevant evidence and that the CO erred by performing his function like a dictator.

DISCUSSION

In *Vito Volpe Landscaping*, 1991-INA-300 (Sept. 29, 1994) (*en banc*), the Board held that although the landscaping jobs involved in that case were "full time" during ten

months of the year, and although they occurred year after year, they could not be considered permanent employment as they were temporary jobs that were exclusively performed during the warmer growing seasons of the year, and from their nature, could not be continuous or carried on throughout the year.

The Employer in the instant case argues that the job position in this application is different from the job positions in *Vito Volpe Landscaping* because this job opportunity involves a new position which requires year-round duties including job bidding and contract negotiations in the winter months. In support of these arguments, the Employer submitted checks documenting year round corporate dividends paid to the owner, copies of six contracts dated January 21 or 22, 2004, and the Employer's statements that the new position was required for expanding business opportunities and because the owner's health was failing.

A written assertion constitutes documentation that must be considered for the purposes of rebuttal. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). However, an employer must provide directly relevant and reasonable obtainable documentation sought by the CO. *Gencorp*, *supra*.

In the instant case, the Employer's assertions were considered by the CO, but the CO found the documentation submitted did not support the assertions made. We agree. Specifically, the corporate dividend checks without any supporting statements did not establish the hours worked or job duties performing during the winter months. In addition, the six contracts did not establish a pattern of work during the winter months. The Employer did not submit any calendars or business plans to document permanent full-time work during the winter months, nor did the Employer submit payroll records for other employees to demonstrate full-time workers who needed supervision during the winter months. The job description included in the application did not include job duties related to obtaining bids or negotiating contracts. The Employer's owner also did not submit any documentation to support his assertion that the new position was required because the business was growing. Under these circumstances, we agree with the CO that the Employer has not demonstrated that this job opportunity is different from the

landscaping jobs considered in *Vito Volpe*, and thus we find the Employer has not demonstrated that this job opportunity is for permanent year-round full-time employment.

This case was before the CO in the posture of a request for reduction in recruitment ("RIR"). Normally, when the CO denies an RIR, the case should be remanded to the local job service for regular processing. *See Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003). This panel, however, has recognized exceptions to the "remand" rule, such as where the application is so fundamentally flawed that a remand would be pointless, for example where the employer has not established that it has presented a *bona-fide* job opportunity. *See Beith Aharon*, 2003-INA-300 (Nov. 18, 2004). In the instant case, the failure to establish that the job offer involves permanent full-time work is such a fundamental flaw in the application that a remand for regular processing is not warranted.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges

Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.